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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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RICHARD E. TIMMONS, CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

II/65762

UNITED STATES OF AMERICA,)
Plaintiff)
)
v.) Civil No. H 86-9
)
CONSERVATION CHEMICAL)
COMPANY OF ILLINOIS, et al.,)
Defendants)

O R D E R

This matter is before the court on an assortment of pretrial motions filed by plaintiff United States and defendants Conservation Chemical Company of Illinois ("CCCI") and Norman B. Hjersted ("Hjersted").

1. United States' Motion to Strike Jury Trial Demand.

By this motion filed December 29, 1986 plaintiff United States asks the court to strike defendants' jury trial demand on the ground that the causes of action are in equity and so are not triable by a jury. After the motion was filed and briefed, however, the Supreme Court of the United States issued its opinion in Tull v. United States, 481 U.S. 412 (1987), holding that the Seventh Amendment entitles parties to a jury trial on the issue of liability, but not on the assessment of penalties or imposition of injunctive relief in cases brought under the Clean Water Act, 62 Stat. Ch. 758, as amended, 33 U.S.C. §1251 et seq.

90-11-6-136

Although the case at hand involves a different statute -- the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901 et seq. ("RCRA") -- the principles involved are the same. Recognizing this, the United States has withdrawn its motion to strike the jury demand with respect to the liability phase of the trial, and asserts it only as to the penalty phase. Pursuant to the reasoning set out in Tull v. United States, the court hereby GRANTS plaintiff United States' amended Motion to Strike Jury Trial Demand. Defendants' jury trial demand is hereby STRICKEN with respect to the penalty phase of the trial only.

2. Defendants' Response to Motion of the United States for Clarification of Order.

On September 18, 1987, the court issued an order denying the Indiana Department of Environmental Management's Motion to Intervene. Shortly thereafter, plaintiff United States filed a motion to clarify that order, asking the court to delete certain language which inaccurately stated the law. The court granted the motion to clarify on October 20, 1987, and ordered that the following language be deleted from the September 18, 1987 order:

> This power [of the EPA] includes the authority to approve or disapprove defendants' closure plans. See 40 C.F.R. Part 265, Subpart G (1986).

Now defendants assert that by plaintiff's recognition of the fact that the EPA does not have the authority to approve or disapprove defendant's closure plans, plaintiff has conceded the correctness of the position raised and argued by defendants in

their second motion to dismiss -- a position defendants say plaintiff "vigorously contested" in its response to that motion. Defendants maintain that as a result of this purported change of position by plaintiff, defendants are entitled pursuant to 28 U.S.C. §2412 to costs and attorneys fees incurred in arguing the EPA's lack of power to review and approve closure plans.

The court finds this claim to be without merit. A perusal of plaintiff's response to defendants' motion to dismiss and the accompanying memorandum reveals no language whatsoever which could be construed as asserting a claim that the EPA has authority to approve or disapprove defendants' closure plans. Indeed, plaintiff's memorandum includes such statements as: "Until the State, which is the governmental entity with authority to review closure and post closure plans. . ." (p.2); "As a result of Phase II authorization, the state has the authority to review RCRA closure plans." (p.9); and "The state is reviewing the closure plan here; the United States has not sought to preclude the State's right of review. Thus the State's role in evaluating defendants' closure plan has been preserved." (p. 9). The court finds no change of position on the part of plaintiff United States. Accordingly, the court DENIES defendant's request for costs and attorneys fees.

Defendant also asserts that because only the state of Indiana has the right to review, approve, or disapprove the closure plans, the fact that the state's administrative review of the closure plan is not complete prevents the entire matter from

being ripe for review by this court. Defendants therefore ask the court to deny the requested relief regarding compliance with the closure plan.

Plaintiff asks for civil penalties under 42 U.S.C. §6928(a) and (g) and for defendants' alleged failure to file a timely closure plan. The fact that defendants later filed a closure plan which is still tied up in administrative review proceedings does not absolve defendants from any liability they may have incurred by their alleged delay in filing the plan in the first place.

Section 6928(a) and (g) clearly allows the imposition of fines for such a "past or current violation." The court sees no ripeness problem whatsoever on this claim for relief arising from the closure plan.

The heart of defendants' motion, however, goes to the injunctive relief requested by plaintiff. In Rhetorical Paragraph F, page 16 of the complaint, plaintiff asks the court to order defendants "to implement as approved or modified, closure and post-closure plans for the Gary facility according to a schedule approved by U.S. EPA and the State of Indiana." Defendants assert that because administrative review of the closure plan is incomplete, and "because there are no indications that CCCI will not comply with the closure plan after the review process, an order compelling Defendants to comply is particularly inappropriate." To obtain injunctive relief, however, one does not have to await the consummation of threatened injury. Peick

v. Pension Benefit Guaranty Corp., 724 F.2d 1247, 1261 (7th Cir. 1983) (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 201 (1983)). Id. As plaintiff points out, in a RCRA action a showing of a risk or likelihood that defendants will violate the Act or its regulations warrants injunctive relief. Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 338 n.5 (4th Cir. 1983).

In this case, injunctive relief under §6928(a) would be appropriate if plaintiff can demonstrate a history of past violations by defendants sufficient to establish a future likelihood of recalcitrance in complying with the requirements of RCRA and the associated state and federal regulations. The fact that the details of the closure plan may not yet be final would not prohibit the court from requiring defendant to comply with the plan when it reaches its final form through the administrative process.

The decision as to whether such injunctive relief will be appropriate in this particular case, of course, is premature and must await trial.

For the reasons stated above, therefore, the court DENIES defendant's request for denial of closure relief and award of attorneys fees.

3. United States' Motion for Leave to File a Memorandum of the History of the Indiana Regulations.

Defendants do not object to the United States' request to submit a short memorandum on the history of the Indiana regulations implicated in this case, except as to certain portions in the memorandum which defendants claim are inaccurate. The court, therefore GRANTS the United States' motion to file the memorandum, duly noting defendants' objections.

4. United States' Motion to Substitute Regulations.

By this motion, submitted on December 10, 1987, the United States seeks to substitute a complete set of the applicable Indiana regulations for an incomplete set previously submitted. Defendants dc not object. The motion to substitute is hereby GRANTED.

5. United States' Motions in Limine, filed September 9, 1987;

6. United States' Motion to Substitute Jury Instructions, filed October 5, 1987; and

7. United States' Motion for Separate trials.

The above-listed motions are all rendered moot by the court's grant of summary judgment on the issue of liability, and are therefore STRICKEN.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v. CIV-83-357T

BORDEN, INC., DECISION and ORDER

Defendant.

INTRODUCTION

Plaintiff United States of America (the Government) brings this motion to enforce a Judgment under Fed. R. Civ. P. 69 and 70, seeking a total of $1,458,000 in penalties from defendant Borden, Inc. (Borden). Borden opposes the Government's motion, and cross-moves under Fed. R. Civ. P. 60(b)(6) for an order relieving it of the penalty provisions of the Judgment in the interest of justice, because it claims it has substantially complied with the Judgment. An evidentiary hearing on the motions was held on February 10 and 11, 1987. For the reasons set forth below, Borden's cross-motion is denied, the Government's motion is granted in part, and a total of $545,000 in penalties is assessed against Borden.

FACTS

The evidence before me establishes the following facts:

Between 1980 and early 1986, Borden operated a canning plant in Lyons, New York which manufactured cans for food products. At the Lyons plant, the cans were coated with a lacquer containing

organic solvents, then baked dry. As the lacquer baked, the solvents evaporated into the surrounding air. Prior to the events at issue in this case, the solvents apparently were released into the atmosphere. See Response of Defendant Borden to Plaintiff's Request for Admissions, No. 11. The solvents used in Borden's coatings were considered to be "volatile organic compounds" (VOCs).

In 1970, Congress enacted a comprehensive set of amendments to the Clean Air Act, 42 U.S.C. § 7401 et seq. Among the amendments, Congress established a National Ambient Air Quality Standard (NAAQS) for photochemical oxidants such as ozone, the principal component of smog. (The NAAQS for photochemical oxidants was subsequently changed to an NAAQS for ozone (see 40 CFR § 50.9). Congress also required the States to establish "State Implementation Plans" (SIPs) for the attainment of the various NAAQSs. In its SIP, each State could propose (within certain limits) its own methods for regulating the emission of pollutants so as to attain the various NAAQSs. The SIPs focussed upon the regulation of VOCs and other hydrocarbons as a means of achieving the NAAQS for ozone, because these compounds are considered to be precursors of ozone.

As part of its SIP, New York State promulgated regulations of surface coating processes under 6 NYCRR Part 228, effective August 23, 1979. Part 228 was accepted by the United States Environmental Protection Agency (EPA) as part of the New York SIP. See 40 CFR § 52.1679. Part 228 required any owner or operator of a

surface coating process having annual potential emissions of VOCs equaling 100 tons per year or more to submit a proposed compliance schedule to the New York State Department of Environmental Conservation (DEC) by January 1, 1980, and to be in compliance with Part 228 by July 1, 1980. Part 228 also set forth permissible emission limitations, and allowed plant owners or operators to meet them by using less organic solvent per gallon of coating, or by using control equipment such as an afterburner, or by a combination of both. In addition, it allowed plant owners or operators to develop a facility-wide emission reduction plan (known as a "bubble"), if the source owner could demonstrate that sufficient reductions in VOC emissions could be obtained by controlling particular emission sources within the facility to the extent necessary to compensate for those other emission sources within the facility which were not in compliance with the prescribed emission limitation.

Borden evidently failed to meet the requirements of Part 228 on time. On September 29, 1981, DEC Environmental Engineer Daniel R. David wrote to Borden's plant superintendent that Borden had determined it was not in compliance with Part 228, and Borden had still failed to submit a compliance schedule. Govt. Ex. 14. EPA issued its own notice of violation on November 17, 1981, under Clean Air Act § 113, 42 U.S.C. § 7413. See Stipulation filed April 18, 1984, ¶¶ 6-7.

In an effort to resolve these matters, Borden entered into a Consent Order with DEC on August 30, 1982. See Plaintiff

United States' First Set of Requests for Admission, Ex. A. Under the Consent Order, Borden was to use coatings with a lower VOC content. According to Borden's Environmental Engineer, Louis Janik, it proved impossible to procure satisfactory lacquers with lower VOC content. Tr. 276-80; see also Plaintiff United States' First Set of Requests for Admission, Exs. B and C. According to a later DEC Order of Modification for the Consent Order, a major error in Borden's calculation of its total VOC emissions was also discovered. Govt. Ex. 2. In either event, it became clear that Borden could not comply with Part 228 by lowering the VOC content of its coatings. By letter of March 2, 1983, Borden was requested to submit a revised compliance schedule no later than April 11, 1983, which date was postponed to May 16, 1983 after a March 16 meeting. Govt. Ex. 28, 29.

During the March 16 meeting, Borden indicated that it would be appealing to the DEC Commissioner and/or the EPA for relief from the requirements of Part 228, because the ozone NAAQS had been attained in the Genesee-Finger Lakes Air Quality Control Region. Govt. Ex. 32. DEC Engineer David stressed at that meeting that Borden's petition must not delay the submission and execution of a compliance plan. Id. The DEC Commissioner responded on May 16, 1983 (Govt. Ex. 34), and EPA responded on August 1, 1983 (Govt. Ex. 31), that Borden's argument was unacceptable, and that Borden would have to comply with Part 228.

In the meantime, on March 31, 1983, EPA had commenced this action against Borden, seeking penalties under Clean Air Act § 113,

42 U.S.C. § 7413, from Borden in the amount of up to $25,000 per day, and injunctive relief. As a means of settling its disputes with EPA and DEC, Borden proposed to install an afterburner to control the emissions from one of its three coating lines sufficiently to offset uncontrolled emissions from its other two coating lines. The negotiations culminated in a stipulation between Borden and the EPA filed with this Court on April 18, 1984, which stipulation was later embodied in a Judgment entered June 11, 1984 by this Court.

THE CONSENT JUDGMENT

The Judgment set forth a detailed compliance schedule for Borden. Under ¶ IV of the Judgment, Borden was required to achieve by December 1, 1984 (and thereafter maintain) compliance with the emission limitations of Part 228 at its Lyons plant. Paragraph V specified several different compliance dates in subparagraphs A through E:

A. By March 1, 1984, submit, pursuant to 6 NYCRR Part 201, an approvable application for a Permit to Construct control equipment to EPA and DEC;

B. By April 1, 1984, receive approval for the Permit to Construct;

C. By April 15, 1984, submit to EPA a progress report;

D. By June 15, 1984, submit to EPA an updated progress report;

E. By July 1, 1984, receive the completely-fabricated control equipment at the facility and begin assembly

and installation:

F. By August 1, 1984, submit to EPA a proposed test protocol which would be used to demonstrate that the facility was in compliance with Part 228;

G. By October 1, 1984, complete assembly and installation of the control equipment at the facility and commence startup;

H. By November 1, 1984, conduct stack tests or other performance tests in the manner approved by EPA;

I. By December 1, 1984, achieve compliance with Part 228 and submit to EPA results of the stack tests or performance tests demonstrating that the facility was in compliance; and

J. By January 15, 1985, submit, pursuant to 6 NYCRR Part 201, an application for a Certificate to Operate to DEC (unless materials previously submitted pursuant to ¶ V.A) satisfy State requirements) and comply thereafter with the requirements of such Certificate when issued.

Paragraph VII of the Judgment required Borden to maintain the control equipment in proper working order.

Under ¶ XI of the Judgment, if Borden failed to take any step set forth in ¶ V by the date specified therein, or violated any requirement of ¶ IV or ¶ VII, Borden was required to make payments to the Government in the amount set forth below "for each

and uncontrollable temperature conditions throughout the afterburner-oven system, including fires, rupture and burnout of expansion joints, and seizure of the recirculation control damper due to the "melt-down" of the nylon control damper shaft roller bearing raceways. Govt. Ex. 7. Borden, APCo, and APCo's subcontractor met quickly to try and solve the problems, yet problems related to overheating were to continue through November 1984. Id.

According to Mr. Janik, Borden remained optimistic until September 1984 that it could continue to meet the dates in the Judgment. Tr. 382-83. On September 13, however, Mr. Janik called EPA Environmental Engineer Mike Pucci, advising him of the problems that Borden was experiencing. Janik also asked Pucci about the status of the proposed stack test protocol that Borden had submitted in July. Tr. 105-08. An EPA memorandum indicates that the proposed test protocol was not forwarded to EPA's Edison, New Jersey facility for review until September 14, 1984 because of inadvertent delay, Def. Ex. 26, although EPA subsequently told APCo that "[t]he time to review this protocol was more than initially anticipated due to inaccuracies in the protocol document." Govt. Ex. 14. Walter Smith, the President of Borden's stack test consultant Entropy Environmentalists (Entropy), testified that he did not hear from EPA until he was contacted by the Edison facility on September 21, 1984. Tr. 136-40. The Edison branch completed its review on September 25, 1984. Govt. Ex. 10.

Janik wrote to EPA on October 2, 1984 and again described

Borden's problems with the control equipment. He stated that, although the date for installation and startup of control equipment was October 1, 1984, '[i]n view of the above noted cone damper repair schedule, Borden will not have truly 'completed' the installation by October 1, 1984 . . . .' Govt. Ex. 6. In view of the operational problems, he requested that EPA arrange with the Court to grant an extension of the compliance schedule dates for items 3 through 5 of at least three months. Although Janik also reminded EPA that Borden's proposed test protocol had not yet been approved, Pucci testified that the letter led him to assign a lower priority to the proposed test protocol, because it indicated that Borden would be unable to comply with the deadlines whether or not the stack test protocol was approved. Tr. 100. Pucci had determined that a plant visit was necessary to evaluate the physical placement of the coating line and afterburner in anticipation of the stack test, so he visited the plant on October 17, 1984. Tr. 54-56. At the time of his visit, the control panel indicated that the afterburner was functioning. Tr. 117-18.

A week after the visit, APCo forwarded design drawings of the control equipment to Pucci. Govt. Ex. 11. Pucci spoke to Janik three times on October 30, 1984. In the first conversation, he informed Janik of the protocol discussions and resolution, and Janik informed him of temperature control problems that had developed at the plant after the October 17, 1984 visit. Govt. Ex. 12. Pucci called Janik back to get a better idea when the

stack test could be conducted. Janik consulted with other Borden personnel, then called Pucci to propose that the modifications to the equipment be completed by November 15, the shakedown of the equipment be completed by December 15, 1984 and the stack testing be completed on January 15, 1985 barring any additional problems. Pucci stated he neither accepted nor denied this proposed schedule, but he subsequently recommended to EPA that the proposed extension be denied and stipulated damages be collected. Govt. Ex. 13. The next day, October 11, 1984, the stack test protocol was approved in writing by EPA (Govt. Ex. 14.), although under the Judgment, the stack test was to be performed by November 1, 1984. On November 2, 1984, EPA wrote Borden and refused Borden's request that EPA arrange with the Court to grant an extension of the stipulated compliance schedule and forgo stipulated penalties. Def. Ex. 9.

In November 27, 1984, Borden attorney Harvey A. Rosenthal wrote to EPA, renewing Borden's request that EPA and Borden mutually agree to an extension of the compliance dates. Govt. Ex. 7. This request was not addressed by EPA until February 12, 1985, when it refused to join Borden in seeking a formal extension of the timetable; EPA stated, however, that "(c)urrent steps taken by Borden to overcome past difficulties and achieve prompt compliance with the terms of the decree will play an important part in EPA's consideration of what additional action, if any, is appropriate to address Borden's failure to comply with the terms of the decree." Def. Ex. 11.

Janik testified that, after the control equipment was

fixed by early November. It ran fairly smoothly through January 1985. Tr. 214-17. Yet Walter Smith of Entropy testified that, despite EPA's October 31, 1984 approval of the stack test protocol, no one from Borden called him through December 1984 to schedule a stack test. On January 10, 1985, Pucci called Janik to see whether Borden had scheduled the testing. Janik called back on January 11 to indicate that he would have the Lyons plant schedule the testing. Govt. Ex. 15. On January 15, 1985, Janik called Smith and scheduled the test for February 6, 1985. He wrote Pucci to confirm this on January 21, 1985. Govt. Ex. 16.

EPA also hired a consultant, to observe the stack test on its behalf. Late in January 1985, the EPA consultant recommended that an entirely different test method be used for the stack test, and recommended other changes as well. Govt. Ex. 17; see also Govt. Ex. 14 (Reference Method 25A originally to be used), and Def. Ex. 11 and 18, § 4.3 (Method 25 actually used). Borden's stack test consultant testified that these changes required that the test be pushed back to February 12, 1985, Tr. 242, 246, although Pucci testified he could not recall the reason for this six-day delay. Tr. 84.

On February 12, 1985 the test was performed. EPA's consultant prepared an observation report indicating some objections to the testing procedure as carried out, but his cover letter concluded that the test was conducted "in a very efficient professional manner." Def. Ex. 38. Entropy prepared its report on March 21, 1985, and Borden forwarded the report to EPA on March 26,

1985. Def. Ex. 13.

Pucci prepared a memorandum indicating several problems with the stack test report. Chief among his concerns was the fact that the report indicated that the control equipment captured more than 100% of the VOCs. Govt. Ex. 20, p. 3. The Government stipulated at trial, however, that greater than 100% capture efficiency can occur in raw data. Tr. 259. In any event, at least some of the concerns were conveyed to Entropy; Mr. Smith testified that the report was revised to correct such problems as Entropy's failure to subtract the weight of the containers used when measuring the amount of lacquer being applied. Tr. 252-53. The report was corrected without rerunning the tests, and the final report was submitted to EPA on July 16, 1985. Def. Ex. 15. It showed that the afterburner was destroying 96% of the VOCs generated by the one coating line, which resulted in destruction of greater than 80% of the VOCs generated by the entire facility, a rate sufficient to satisfy Part 228. Janik testified that EPA never indicated to Borden that there was any further problem with the stack test, Tr. 135, yet the Government's papers indicate that EPA still considers the stack test results unacceptable. Govt. Brief at 6.

In the meantime, other problems had developed with the control equipment. Borden's records indicate that the afterburner was not operating most of the time beginning April 12, 1985. Govt. Ex. 23. The afterburner system was shut down on April 17, 1985 because vibrational problems had caused insulation fragments to be

deposited on the unbaked sheets passing through the oven. Def. Ex. 16. Borden told EPA that, in order to allow APCo sufficient time to prefabricate and deliver the required replacement equipment, the repair work was scheduled for the Memorial Day weekend, and the afterburner went back on stream on May 28, 1985. Def. Ex. 17. Plant manager Larry Sparks told Ducci on October 29, 1985, however, that Borden waited for the holiday weekend because it could not have afforded to shut down its production line immediately to repair the afterburner if it wanted to honor various multi-million-dollar contractual obligations. Govt. Ex. 8; Tr. 73-74.

Although Borden's records indicate that after May 29, 1985 the afterburner operated without problems except for two days, Borden delayed in submitting its application for a Certificate to Operate (CTO) for several months. Janik testified at first that Borden did so because it believed DEC would not issue a CTO until EPA had approved the stack test results, but Janik then admitted that Borden apparently forgot to submit the application. Tr. 174-77. Borden apparently was reminded at the October 29, 1985 meeting with EPA. Govt. Ex. 8. On November 19, 1985, Borden requested a DEC inspection of the facility so that a CTO could be obtained. Def. Ex. 22. On December 3, 1985, Borden submitted its application for a CTO. Def. Ex. 23. DEC performed a field inspection of the plant in connection with the CTO application. Govt. Ex. 15. Borden's operating logs (which were required to be kept under the terms of the Permit to Construct) indicated to DEC

that the plant had been in compliance as of June 1, 1985. Def. Ex. 12. The CTO was issued February 5, 1986. Def. Ex. 31. In the meantime, the DEC Consent Order had been renegotiated on January 9, 1986 (Govt. Ex. 3), and on the same day, Borden had sold the facility to C-B Foods.

DISCUSSION

I.

A consent decree is to be construed for enforcement purposes as a contract. United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975). A District Judge should not take it upon himself to modify the terms of a settlement decree, nor should he participate in any bargaining for better terms. Taitt v. Chemical Bank, 810 F.2d 39, ___ Adv. Sh. at 1134 (2d Cir. 1987); Plumer v. Chemical Bank, 668 F.2d 654, 655 n. 1 (2d Cir. 1982). Deference is to be paid to the plain meaning of the consent decree and normal usage of the terms selected. Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985).

In this case, Borden made no effort until now to modify the terms of the Judgment to which it agreed in 1984. It now seeks relief from the Judgment's penalty provisions under Fed. R. Civ. P. 60(b)(6) in the interests of justice because of what it considers to be "substantial compliance" with the Judgment (in that it has reduced VOC emissions to comply with Part 228). The Government argues that substantial compliance is not enough, citing the unreported decision of United States v. Perkiomen Valley Preservation Society, No. 84-1498 (760 F.2d 262) (3rd Cir.

March 27, 1985), and United States v. City of Providence, 492 F. Supp. 602, 609 (D.R.I. 1980). Borden counters that in those cases, unlike this case, there was no evidence of defendants' good faith effort to comply, and thus there could have been no "substantial compliance" in those cases.

I question whether "substantial compliance" constitutes grounds for modification of specific penalty provisions of a consent judgment; in all of the cases cited by the parties, it was being raised as a defense to attempts to impose contempt sanctions for violations of consent orders, not to enforce specific penalty provisions. Even if "substantial compliance" can be a basis for modifying the bargained-for penalties in a consent judgment, I do not believe Borden has demonstrated "substantial compliance" in this case.

Although Borden considers the ultimate purpose behind the Judgment to have been the elimination of harm to the ecology, and the Government considers the purpose to have been to cause Borden to comply with the New York SIP, the Judgment "itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." Local No. 93 v. City of Cleveland, 106 S.Ct. 3063, 3076 (1986), quoting United States v. Armour & Co., 402 U.S. 673, 681-82 (1971). The scope of a consent decree must be discerned within its four corners, not by reference to what might satisfy the purposes of one of the parties to it.

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, ____, 104 S.Ct. 2576, 2586 (1984). Every single paragraph of the Judgment for which violations were subject to stipulated penalties was a paragraph setting forth a compliance date. No matter what Borden or the Government considers to be the purpose of this Judgment, what the Judgment contains is a series of dates with which Borden was to comply. By stipulating to the deadlines in the Judgment, Borden avoided the substantial penalties with which it was being threatened at the time. See Govt. Ex. 31, 32; Judgment ¶ IV. By being allowed to delay compliance with the regulations, Borden had already been rewarded for not complying and given an unfair advantage over competitors who had expended the resources to comply. See Govt. Ex. 34. Under these circumstances, I see no reason to relieve Borden under Rule 60(b)(6) from the penalty provisions of the Judgment to which Borden agreed. A defendant who has obtained the benefits of a consent decree -- not the least of which is the termination of the litigation -- cannot then be permitted to ignore such affirmative obligations as were imposed by the decree. Berger v. Heckler, supra, 771 F.2d at 1568; see also, Nemaizer v. Baker, 793 F.2d 58, 63-64 (2d Cir. 1986); Wheeling-Pittsburgh Steel Corp. v. Fraternal Association of Steel Haulers, 601 F.2d 1269, 1274 (3rd Cir. 1979); and Bell Telephone Laboratories, Inc. v. Hughes Aircraft Co., 73 FRD 16, 21 (D. Del. 1976)

II.

The Government argues in its motion papers that, under the

language of ¶ XI of the Judgment, Borden is liable for a stipulated penalty for a violation of any paragraph of the Judgment, and thus that it can be liable for as many as three separate violations (of ¶¶ IV, V and VII) on a given day. At the hearing, the Government presented computations of penalties which, in addition, would penalize Borden for violations of the different subparagraphs of ¶ V committed on the same day. Borden cites United States v. National Steel Corp., 767 F.2d 1176, 1183 (6th Cir. 1985), and United States v. Detrex Chemical Industries, Inc., 393 F. Supp. 735, 738 (N.D. Ohio 1975), for the proposition that Borden should be penalized only once for each separate day of violation, no matter how many separate violations occurred on that day.

I do not read these cases as broadly as does Borden. In Detrex, the penalties were being assessed under the Clean Water Act, 33 U.S.C. § 1319, not under a consent judgment. In National Steel, the consent decree specified that the company would not be penalized for failure to meet emission limitations if it was also being penalized for failure to meet construction or installation schedules; there is no such provision in the Judgment here.

Nevertheless, I believe it would be inappropriate in this case to penalize Borden for more than one violation of the Judgment on any one day. Under ¶ XI of the Judgment, the penalties are assessed "for each day of non-compliance." If separate penalties were to be assessed for each violation, the language of the Judgment could easily have reflected that fact. As noted earlier, deference must be paid to the plain meaning of the Judgment and the

normal usage of the terms selected. Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985). Even assuming that the language of the Judgment is susceptible of the Government's interpretation, a forfeiture provision such as this should be strictly construed against the Government, because equity and the law abhor forfeitures. United States v. National Steel Corp., supra, 767 F.2d at 1184.

III.

The Government alleges that Borden violated ¶ VII of the Decree by operating its coating lines without the afterburner for a total of 51 days after November 1, 1984. Borden concedes that production continued without the afterburner on those 51 days, but raises a defense which it also raises in connection with the claimed violations of ¶¶ IV and V. Borden's claimed defense is based upon ¶ XII of the Judgment, which excuses any violations of ¶¶ IV, V, or VII:

> . . . only to the extent and for the duration that such failure to comply with the requirements is caused by an event entirely beyond the control of Borden. Increased costs or changed business conditions shall not be considered beyond Borden's control . . .. The burden of proving that a failure to comply with paragraphs IV, V, or VII is excused by this paragraph shall rest with Borden.

Borden claims that the 51 days of noncompliance are excusable because of the unforeseeable failure of Borden's contractor (APCo) to provide proper equipment, and unforeseeable technological problems.

The 51 days of noncompliance with ¶ VII, and the failure to meet the deadlines in ¶¶ IV and V, are not excusable because of

the fact that the work was done by a contractor rather than by Borden. When the stipulation was signed and when the Judgment was entered, all parties knew that the work was to be contracted out: Borden had already entered into its contract with APCo, several months earlier. Yet ¶ VI of the Judgment states flatly that, "[r]esponsibility for compliance with 6 NYCRR Part 228 shall rest solely with Borden." By earlier contracting out the installation of the control equipment on a turnkey basis, Borden cannot avoid its responsibility under this Judgment or under federal and State pollution control laws.

Borden cites 40 CFR § 66.31 in support of its argument that its conduct was excusable. At the time the Judgment was signed, that section stated that an "inability to comply with the legal requirement resulting from reasons entirely beyond the control of the owner or operator" included

> 6) The verifiable and unforeseeable failure of pollution control equipment and associated process equipment to perform at reasonably anticipated design levels despite the best efforts of the source owner or operator in designing, operating and maintaining the control and process equipment or other emission control measures, provided that such efforts were reasonably calculated to achieve compliance; or
>
> 7) The complete inability of a supplier or contractor to furnish labor or materials necessary to achieve compliance, provided the source owner or operator demonstrates:
>
> i) That the source owner or operator or an affiliated entity in no manner sought, caused, encouraged or contributed to the inability; and
>
> (ii) That the source owner or operator in no way unduly delayed negotiation for needed equipment or fuel supply or made unusual demands not typical in its industry, or placed unusual restrictions on

> the supplier, or delayed in any other manner the delivery of goods or the completion of the necessary construction.

Although ¶ XV of the Judgment specifically refers to 40 CFR Part 66,[3] the Government argues that the quoted regulations were part of a complicated, computerized formula designed to nullify any economic benefit recognized by a non-complying company when EPA assessed a penalty in an administrative proceeding, and are quoted out of context in this case.

I agree with the Government that 40 CFR Part 66 is inapplicable in this context. Even if Borden's conduct could be considered excusable under 40 CFR Part 66 (which I do not believe it could), it is unnecessary to go beyond the four corners of the Judgment in this case to determine that Borden's actions were not excusable. Mr. Smith of Entropy testified that breakdowns of pollution control equipment at the outset of operation are neither unexpected nor surprising. Tr. 162-64. Mr. Janik testified that, if APCo had corrected the root cause of the problems (i.e., overheating) promptly, Borden could have met the deadlines set forth in the Judgment. Tr. 164-65. The record is replete with instances when parts of the control equipment failed and were replaced with more heat-resistant components. These failures to install suitable heat-resistant components at the outset in a high-temperature afterburner, and the resulting breakdowns, can hardly be considered "unforeseeable technological problems" beyond Borden's control which would constitute an excuse under ¶ XII of the Judgment, nor do they demonstrate the "complete inability of a . . . contractor

to furnish . . . materials necessary to achieve compliance . . . ," under 40 CFR Part 66.

In short, if Borden wishes to shift responsibility to APCo, it cannot do so under the terms of the Judgment. Borden, not APCo, is responsible to EPA for compliance. APCo's responsibility to Borden is governed by its contract with Borden, and will be determined in the State Court proceeding which Borden has instituted against APCo.

Under ¶ XI of the Judgment, the first 30 days of operation without the afterburner result in a penalty of $250 per day, and the remaining 21 days incur a penalty of $500 per day, for a total of $18,000. In comparison to the penalties under ¶¶ IV and V of the Judgment, this penalty is remarkably small. If, as Mr. Sparks allegedly told Mr. Pucci, Borden officials consciously decided not to shut down the plant for afterburner repairs because it had contracts to meet, this penalty is a small price to pay for that decision. Nevertheless, the parties agreed upon the appropriate penalties, and it would be error for this Court to depart from the bargain struck by the parties and recorded in the Judgment. Taitt v. Chemical Bank, supra, 310 F.2d at _____, Adv. Sh. at 1136.

IV.

The Government next alleges that, under ¶ IV of the Judgment, Borden was to have been in compliance with the emission limitations of Part 228 by December 1, 1984. DEC determined that Borden was not in compliance with Part 228 until June 1, 1985. Although Borden claims that DEC could have made a determination

that Borden was in compliance as early as November of 1984, Borden did not request a compliance inspection until November 19, 1985, at which point DEC made the determination that Borden had been in compliance months earlier. (This defense will be addressed in greater detail in Part VIII of this Decision, below.)

Nevertheless, as discussed in Part VI of this Decision, it appears that 60 days of Borden's delay are excusable, based upon EPA's delay in approving Borden's proposed stack test protocol. Accordingly, the penalty would run from January 31, 1985 (not December 2, 1984) until May 31, 1985. This 121-day delay in compliance would result in $82,500 in penalties under this paragraph of the Judgment.

V.

The Government next argues that Borden failed to comply with ¶ V. subparagraph G, because it did not "complete assembly and installation of the control equipment at the facility and commence startup" by October 1, 1984. The Government points in particular to its Exhibit 6 (in which Mr. Janik stated on October 2, 1984 that, in view of the necessary repairs to the cone damper, "Borden will not have truly 'completed' the installation by October 1, 1984"), and to Government Exhibit 7 (Borden's November 27, 1984 letter renewing its request for an extension of the October 1 startup date).

The plain language of the Judgment, however, requires only that startup have been "commenced" by October 1, 1984. There is no

question that the control equipment was installed by July 16, 1984, that Borden "commenced" startup on or about July 19, 1984, and that the control equipment immediately overheated and was shut down. Mr. Pucci admits the control equipment appeared to be operating when he visited the plant on October 17, 1984. Tr. 107-08. Although the technical problems kept the control equipment from operating consistently through at least early November 1984, that failure to keep the equipment operating is the subject of other paragraphs of the Decree; ¶ V, subparagraph G requires only that the equipment have been installed and startup commenced by October 1, 1984. This Court must concern itself with the Judgment as a whole, resolving any ambiguity in a manner that "best accords with the sense of the remainder of the contract." Taitt v. Chemical Bank, supra, 810 F.2d at _____, Adv. Sh. at 1134, quoting National Equipment Rental Ltd. v. Reagin, 338 F.2d 759, 762 (2d Cir. 1964).

Accordingly, no penalties will be assessed under this subparagraph.

VI.

The Government next argues that penalties should be assessed against Borden for failure to comply with ¶ V, subparagraph H of the Judgment, which requires Borden to have conducted stack tests or other performance tests in the manner approved by EPA by November 1, 1984. Borden stipulated that the stack test was not actually performed until February 12, 1985, but blames the delay on EPA's delaying of the approval of the stack

test protocol until October 31, 1984, and EPA's consultant's changes in the test protocol in January, 1985.

Mr. Pucci admitted that, in his experience, it took anywhere from two weeks to two months or more to set up a stack test once EPA had approved the test protocol. Tr. 94-97. In this case, EPA required Borden to provide a minimum of two weeks notice of the stack test. Govt. Ex. 14. Mr. Pucci stated that, if a protocol was totally overhauled, it could take more than two months to arrange the stack test. Tr. 94-97.

Mr. Smith of Entropy stated that his company could have done the stack test on two weeks notice, if it had the necessary equipment ready. Tr. 244. He stated that he received a copy of the October 31, 1984 letter approving the protocol, Tr. 267, and thus his company apparently could have conducted the tests in November. He stated that, by December, he was setting the necessary equipment aside on his own because he had a feeling that Borden was about to order the tests. Tr. 265-66. Yet despite Mr. Janik's testimony that the control equipment ran fairly smoothly from November, 1984 through January, 1985 (Tr. 314-17), Mr. Smith states that no one from Borden asked him to perform the tests until January, 1985. Tr. 266.

Considering these facts, it is impossible to attribute the entire period of Borden's delay to EPA. I find that it would have taken approximately one month from October 31, 1984 for Borden to have arranged the stack tests. Add to this the six days of delay necessitated by the EPA consultant's change in the protocol in

January, 1985, and allowing Borden additional time to reflect the fact that these events occurred during the holiday season when it would have been difficult to arrange the tests, and I conclude that a delay of 60 days is excusable under ¶ XII of the Judgment because of EPA's delay.

Excusing these 60 days, Borden was still 42 days late in having the stack test completed. The first 30 days of that delay would result in penalties of $250.00 per day, and the last 12 days would result in penalties of $500.00 per day, for a total of $13,500.00.

VII

The Government next claims that Borden should be subject to penalties for its violations of ¶ V, subparagraph I in failing to submit the stack test results and in failing to achieve compliance with Part 228 by December 1, 1984.

Although the record indicates that Borden submitted the initial stack test results on March 26, 1985, the Government argues in its papers that the stack test results were unacceptable, and thus that the violation of this subparagraph continued until Borden sold the facility on January 9, 1986. This argument is belied by the fact that EPA transmitted its comments on the stack test results to Entropy, which was able to submit revised stack test results on July 15, 1985 without having to rerun the test. Def. Ex. 18. The argument is further belied by the fact that, at the hearing, EPA sought penalties under this subparagraph only until June 1, 1985, that is, the date by which DEC considered Borden to

be in compliance with Part 228. Based on the evidence before me, I find that Borden submitted sufficient stack test results on March 26, 1985. Although revisions had to be made in the report, the revisions were not of such a nature that Borden should be penalized beyond March 26.

In addition to any penalty for its delay in submitting the stack test results, however, Borden still would owe a penalty beyond March 26 because subparagraph I also required it to be in compliance with Part 228 by December 1, 1984. DEC determined that Borden was not in compliance with Part 228 until June 1, 1985. Excusing 60 days of delay due to EPA's delay in approving the stack test protocol, Borden's delay of 121 days would result in the same penalty assessed under ¶ IV of the Judgment, that is $82,500.[3]

VIII.

The Government next argues that Borden should be penalized under Paragraph V, subparagraph C for its failure to apply for a Certificate to Operate (CTO) by January 15, 1985. Although the actual application form was not submitted until December 3, 1985, Def. Ex. 13, Borden argues (1) that it would have been futile to submit an application to DEC, because DEC was waiting for EPA approval of the stack test results, and (2) that Borden had submitted all the information necessary for DEC to have granted the Certificate to Operate prior to January 15, 1985.[4]

Mr. Janik at first testified that DEC would not have granted the Certificate to Operate until after it had renegotiated its own Consent Order with Borden, and that DEC personnel had told

operation achieved . . . ." Mr. David's testimony supports this letter: he testified that he told Mr. Janik on June 19, 1984 that the source should be in normal operation before Borden submitted the application for a CTO. Tr. 200. Moreover, at the only DEC inspection between the installation of the afterburner and Borden's filing of its application (a routine annual inspection in December, 1984), Mr. David noted a problem with a broken collector hood. Def. Ex. 27. Mr. David testified that this broken hood would probably have prevented the issuance of a CTO. Tr. 199, 231-32. It was made abundantly clear to Borden that the afterburner would have to be operating properly and inspected before a CTO could be issued. Govt. Ex. 26; Def. Ex. 21.[7]

In addition, the importance of the certification required in the CTO application should not be minimized. Without this certification, DEC cannot know that the construction was completed in accordance with the permit unless DEC disassembles the control equipment. With the certification, DEC can hold Borden responsible if it later develops that the control equipment was not built in accordance with the permit.

Accordingly, I find that the materials submitted to DEC pursuant to Paragraph V(A) of the Judgment did not satisfy state requirements for an application for a CTO under Paragraph V(J). Mr. Janik testified that he was familiar with the CTO application process, Tr. 368, and it is clear that Borden personnel knew DEC insisted that the facility be operating normally before a CTO could be issued. Once the control equipment was operating normally (as

Mr. Janik testified it was in November, 1984), Borden could have certified this to DEC so that an inspection could have been scheduled, the DEC Consent Order renegotiated, and a CTO issued. Borden did not do so until December 3, 1985. Until it did so, there was no way for DEC to determine that Borden had satisfied all the conditions in the Permit to Construct.

Borden also argues that it is unfair to penalize it for mere paperwork delays, citing Aspira of New York, Inc. v. Board of Education, 423 F. Supp. 647, 653-54 (S.D.N.Y. 1976). Aspira holds, to the contrary, that inability to comply with a judgment can be a defense in a civil contempt proceeding, but it must be shown categorically and in detail, "certainly not less where the obligations in question were accepted in a decree entered on consent." Id. at 654. Unfortunately, paperwork violations, like substantive violations, can sometimes have dire consequences. See, e.g., Daviess County Hospital v. Bowen, __ F.2d ____, No. 85-2407 (7th Cir. January 20, 1987).

The real incongruity here is in the amount of the penalty for this violation, when compared to the $18,000.00 penalty for actually operating without an afterburner for 51 days. Even assuming DEC would have awaited the stack test results before issuing the CTO, and excusing the first 60 days because of EPA's delay in approving the stack test protocol, Borden was still 262 days late in applying for the CTO, which would result in a penalty of $435,000.00. Although this penalty would be large, it is the penalty bargained for by the parties, and it would be error for the

Court to interpret the Judgment in a manner that departs from the bargain struck by the parties. Taitt v. Chemical Bank, supra, 810 F.2d at _____, Adv. Sh. at 1136. Perhaps in the final analysis, the large penalty for this "paperwork" violation and the small penalty for the "substantive" violation of ¶ VII offset each other.

CONCLUSION

EPA and Borden struck a bargain, and under the language of that stipulation, the following penalties would be appropriate:

a. $82,500 in penalties for violation of Paragraph IV;
b. No penalty for any violation of Paragraph V(G);
c. $13,500.00 in penalties for violation of Paragraph V(H);
d. $82,500.00 in penalties for violation of Paragraph V(I);
e. $435,000.00 in penalties for violation of Paragraph V(J);
f. $18,000.00 in penalties for violation of Paragraph VII.

As noted above, however, the violations of the separate paragraphs of the Judgment are treated simply as a single violations of the Judgment on any given day. These violations would include violations of ¶ VII on November 3, 4, 21, and 27, and December 20-21, 1984, and January 2, 3, 4, 17, and 21, 1985, and then extend from January 31, 1985 until December 3, 1985. These 318 days of violation result in a single penalty of $545,000. Accordingly, EPA's motion to enforce the Judgment is granted and penalties are assessed against Borden in a total amount of $545,000.00. Borden's cross-motion for relief from the penalty provisions of the Judgment

is denied.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York,
March 11, 1987.

FOOTNOTES

1. In its motion papers, EPA also sought payment of a $20,000.00 penalty under ¶ XIII of the Judgment. In its reply papers, Borden submitted proof that the $20,000.00 had been timely paid to EPA already. Accordingly, EPA stipulated prior to the hearing on this matter that the $20,000.00 had been paid.

2. Paragraph XV states that

> Defendant acknowledges that plaintiff has advised it of the provisions of Section 120 of the Clean Air Act, 42 U.S.C. § 7420, and the regulations promulgated thereunder, 40 CFR Part 66 (45 Fed. Reg. 80086, et seq.), relating to the mandatory payment of noncompliance penalties by major air pollution sources violating certain applicable emissions limitations. This acknowledgement does not represent an admission by defendant of any liability for such noncompliance penalties.

3. At the hearing, Borden also objected to the assessment of penalties beyond January, 1985, claiming that the Government sought no penalties beyond that date in its motion papers. Tr. 81. Yet Page 6 of the Government's motion papers stated that penalties initially were sought until January 9, 1986.

4. At the hearing of this matter, Borden also objected to the imposition of penalties for this violation beyond August 1, 1985, arguing that the Government had only sought penalties to that date in its motion papers. Tr. 83. The Government motion papers indicate that the August 1, 1985 date apparently was supplied to the Government by DEC; there was no indication at the hearing of any other basis for that particular date. Because the use of that date does not appear to be the fault of the Government, and because it is clear from the record that the application was not submitted until December 3, 1985, penalties will be assessed through December 3, 1985.

5. There is no question that the re-negotiation of the DEC Consent Order was a precondition for issuance of the CTO. See Govt. Ex. 29, ¶ 1. Exhibit 29 makes it clear that the modification was being negotiated as of March 2, 1984. DEC engineer David testified that Borden had DEC's draft of the proposed modification but did not sign it, Tr. 229, and Government Exhibit 27 indicates that, as of January 1985, Borden told DEC that Borden was declining to execute the modification pending resolution of its dispute with EPA over deadlines for the afterburner. Thus, the mere failure to renegotiate the DEC Consent Order (which was accomplished in about

a month, once Borden applied for a CTO) appears to be Borden's fault, rather than the fault of DEC or EPA.

6. Apart from Mr. Janik's testimony that the failure to apply for the CTO was an oversight, his testimony that no one at EPA ever told Borden that the stack test results were unacceptable (Tr. 111) belies Borden's argument that it was awaiting EPA approval of the stack test results before applying for the CTO.

7. If Borden had remembered to apply for the CTO after the stack test results were submitted in March, 1985, Mr. David testified that DEC "may or may not have been able to issue a Certificate to Operate," although the subsequent operational problems would have caused DEC to not feel "comfortable with having issued it." Tr. 186. As noted earlier, Borden might have been able to obtain the CTO even if it had applied before the stack test results were submitted, if it had fulfilled all the other conditions of the Permit to Construct (which included, inter alia, renegotiation of Borden's Consent Order with DEC). Tr. 231. Given the many conditions of the Permit, it is impossible for this Court to determine in hindsight when DEC would have approved Borden's application; the only way for Borden to have obtained such a determination was for Borden to submit its application (which it did not do until December 3, 1985), undergo an inspection, and sign the DEC's modified Consent Order. Mr. Janik did not dispute that it is DEC which must make the determination whether Borden is entitled to a CTO. Tr. 368-69.

U.S. Department of Justice

DTB:BAR:lls
90-7-1-390

Washington, D.C. 20530

August 21, 1990

BY TELEFAX

Michael A. Cyphert, Esquire
Thompson, Hine and Flory
1100 National City Bank Building
629 Euclid Avenue
Cleveland, Ohio 44114-3070

Re: United States v. Master Metals, Inc.
(Civil Action No. C-87-1471)

Dear Mr. Cyphert:

This letter follows up on my recent requests for a copy of the draft report on the environmental risk assessment that was conducted at the Master Metals facility at the request of an insurance company from whom Master Metals applied for insurance. The May 29, 1990 draft report by Marcus Jones from Environmental Strategies Corp. is referred to in your client's monthly report to EPA for the period from June 17 - July 17, 1990.

Pursuant to Section VII.E.1 - 5 of the Consent Decree in this action, the draft report should have been supplied to the United States by your client with the referenced monthly report, as part of the company's attempt to demonstrate its efforts to obtain liability insurance coverage required under the Decree.

As you are aware, during the week of July 30, 1990, I requested that you arrange for your client to provide the United States a copy of that report. You indicated that you would contact your client, whom you expected would provide a copy in the near future. I did not receive a copy of the report and, during the week of August 13, 1990, called you again to inquire. You informed me that you had sought the document from your client, who notified you that a final report had not yet been issued. I responded by requesting a copy of the report even if it was in draft form. You agreed to again confer with your client and attempt to have a copy of the report provided.

To date I have not been provided a copy of the report.

On August 17, EPA inspector Catherine McCord performed a follow-up inspection of the Master Metals facility, at which time she asked Tom Helms, plant superintendent, to request that Mr. Mickey telefax a copy of the risk assessment report to her. Mr. Helmes agreed to relay the request to Mr. Mickey. Ms. McCord has not received a copy of the report.

EXHIBIT 2

While we appreciate your efforts thus far in attempting to arrange to get this document to us, we note that the fact we have not received it suggests that your client has not demonstrated that it exercised best efforts to obtain liability insurance as required under the Decree.

Sincerely,

Acting Assistant Attorney General
Environment and Natural Resources
Division

By: Barbara Rogers

Barbara Rogers, Attorney
Environmental Enforcement Section
(202) 514-4113

cc: Arthur Harris
Stuart Hersh
Catherine McCord